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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Marisa DeVault,)	
)	
Plaintiff,)	CIV 11-01423 PHX RCB (MEA)
)	
v.)	REPORT AND RECOMMENDATION
)	
Maricopa County, et al.,)	
)	
Defendants.)	
)	
)	

TO THE HONORABLE ROBERT C. BROOMFIELD:

This matter is before the Magistrate Judge on referral from the District Judge, and the determination of the Magistrate Judge is dispositive of some of Plaintiff's claims. Accordingly, the following proposed findings of fact, report, and recommendation are made pursuant to Rule 72(b), Federal Rules of Civil Procedure, and 28 U.S.C. § 636(b)(1)(B) and (C).

Background

Plaintiff, who is represented by counsel in this matter, filed a complaint in the Maricopa County Superior Court on March 10, 2011. The complaint alleges a state-law cause of action for negligence, i.e., medical malpractice, and a cause of action for violation of Plaintiff's rights pursuant to 42 U.S.C. § 1983, i.e., deliberate indifference to Plaintiff's serious medical needs in violation her federal constitutional rights.

1 Plaintiff alleges Defendants failed to provide adequate
2 medical care to Plaintiff (for an infection arising from a leg
3 injury sustained prior to her incarceration), while Plaintiff
4 was a pretrial detainee in a jail operated by the Maricopa
5 County Sheriff's office, in March through May of 2009.¹ The
6 complaint seeks compensatory and consequential damages, damages
7 for pain and suffering, punitive damages, and an award of
8 attorneys' fees.

9 Defendants were served and the matter was removed to
10 federal court by Defendants on July 18, 2011. On July 22, 2011,
11 the Court ordered Defendants to answer or otherwise respond to
12 the complaint.

13 On August 8, 2011, Defendants Maricopa County, Arpaio,
14 Gan, Gregorio, Mitchell-Lopen, Hansen, Gaskins, Perez, and
15 Johnson, the "County Defendants", filed a motion to dismiss all
16 claims against these Defendants. See Doc. 5. The County
17 Defendants argued, *inter alia*, that Plaintiff had not exhausted
18 her administrative remedies, precluding her section 1983 claim,
19 and that the state negligence claim was barred by Plaintiff's
20 failure to comply with Arizona's notice of claim statutes the
21 applicable statute of limitations. On September 1, 2011,

22
23 ¹The complaint alleges that, due to Defendants' negligence
24 in March, April, and May of 2009, the bone in Plaintiff's leg became
25 infected requiring hospitalization and surgery performed in June of
26 2009. Plaintiff alleges that, as a result of Defendants' negligence,
27 Plaintiff's leg is deformed and she is disabled and disfigured.
Plaintiff further alleges that, as a result of Defendants' negligence,
during her hospitalization it was necessary for medical staff to
insert a "pick" line and that as a result of the pick line Plaintiff
has a pulmonary embolism and her health is permanently damaged.

Defendants Arcadia Radiology and Nocera filed an answer to the complaint.

On September 22, 2011, Plaintiff docketed an amended complaint. See Doc. 10. On September 23, 2011, the County Defendants filed a motion to strike the amended complaint. See Doc. 12. Defendants Arcadia Radiology and Nocera joined the motion to strike on September 27, 2011. See Doc. 13.

In an order issued November 7, 2011, the Magistrate Judge denied the motion to strike and granted the motion to amend the complaint; the motion to amend was granted only insofar as Plaintiff sought leave to assert she had complied with the state notice of claim statute and only because this proposed amendment was not facially futile. See Doc. 26. The Magistrate Judge noted that Plaintiff's alleged failure to exhaust her section 1983 claim was an issue which was more properly resolved in a motion to dismiss, rather than a motion to amend a complaint.

On November 7, 2011, the District Court denied the motion to dismiss at Doc. 5 as moot without prejudice. See Doc. 27.

On November 18, 2011, Defendants Arcadia Radiology and Nocera filed an answer to the amended complaint. See Doc. 29.

On November 15, 2011, the County Defendants filed a motion to dismiss the claims stated against these defendants in the amended complaint. See Doc. 28. Plaintiff responded to the motion and also filed a motion to strike portions of the motion to dismiss on December 6, 2011. See Doc. 30 & Doc. 31.

1 **Motion to Strike**

2 Plaintiff asserts:

3 Plaintiff Marissa DeVault ("DeVault"),
4 through counsel undersigned, pursuant to Rule
5 12(d), FRCP, respectfully requests the Court
6 strike Defendants Exhibits 1, 2, 3, 4 and 8
7 and all argument raised regarding same in
8 Defendants Motion to Dismiss for the reasons
9 set forth in Plaintiff Response to the Motion
10 to Dismiss First Amended Complaint, which is
11 incorporate herein by this reference. These
12 Exhibits and argument involve matters outside
13 the pleadings and should not be addressed at
14 this stage without an answer having been
15 filed or any discovery having been conducted.
16 In the alternative, Plaintiff requests leave
17 to conduct discovery and to supplement her
18 response upon completion of that discovery.

19 Doc. 31 at 1.

20 Defendants respond:

21 Plaintiff's Motion is not well grounded and
22 should be denied. The documents submitted by
23 the Defendants establish that Plaintiff's
24 lawsuit must be dismissed; Plaintiff now goes
25 to great lengths to avoid that inevitable
26 result. Rule 12(d), Federal Rules of Civil
27 Procedure, provides that "If, on a motion
28 under Rule 12(b)(6) or 12(c), matters outside
29 the pleadings are presented to and not
30 excluded by the court, the motion must be
31 treated as one for summary judgment under
32 Rule 56." There is no requirement, as
33 Plaintiff argues, that the documents
34 submitted by Defendants be supported by
35 authenticating record-keeper affidavits. The
36 materials submitted are public records and/or
37 documents created by Plaintiff herself. Yet
38 Plaintiff tries to diminish the significant
39 impact of these records because they
40 establish that her claim is meritless and her
41 efforts to avoid dismissal of this lawsuit
42 are moribund.

43 Doc. 32 at 2.

1 Two of the exhibits Plaintiff seeks to strike, Exhibit
2 2 and Exhibit 8 to Defendants' motion to dismiss, relate to the
3 issue of Plaintiff's alleged failure to exhaust her
4 administrative remedies prior to filing a section 1983 claim.
5 The Ninth Circuit Court of Appeals has held that the issue of
6 whether a plaintiff's section 1983 suit is precluded by their
7 failure to exhaust administrative remedies pursuant to section
8 1997e(a) is a matter in abatement which is properly addressed in
9 an unenumerated motion pursuant to Rule 12, Federal Rules of
10 Civil Procedure. See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th
11 Cir. 2003). See also Ray v. Kertes, 285 F.3d 287, 295 (3d Cir.
12 2002); Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001);
13 Jackson v. District of Columbia, 254 F.3d 262, 267 (D.C. Cir.
14 2001); Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999);
15 Jenkins v. Haubert, 179 F.3d 19, 28-29 (2d Cir. 1999). Matters
16 outside the pleadings may be considered and factual disputes
17 resolved when determining whether a section 1983 claim should be
18 dismissed for failure to exhaust. See, e.g., Wyatt, 315 F.3d at
19 1119-20 ("In deciding a motion to dismiss for a failure to
20 exhaust nonjudicial remedies, the court may look beyond the
21 pleadings and decide disputed issues of fact.").²

22 2

23 "When ruling on a motion to dismiss, we may
24 'generally consider only allegations contained in
25 the pleadings, exhibits attached to the
26 complaint, and matters properly subject to
27 judicial notice.'" Id. at 899-900 []. We accept
28 factual allegations in the complaint as true and
construe the pleadings in the light most
favorable to the nonmoving party. Id. at 900. We
need not accept as true conclusory allegations

1 Accordingly, with regard to Exhibit 2 and Exhibit 8 to
2 the motion to dismiss, the exhibits are properly considered in
3 the context of the motion to dismiss, without requiring
4 Plaintiff the opportunity to conduct discovery to ascertain
5 their authenticity, which Plaintiff does not seem to actually
6 contest, and the Magistrate Judge will recommend that the motion
7 to strike be denied.

8 **Motion to Dismiss**

9 Count I of the amended complaint asserts a violation of
10 Plaintiff's Fourth, Eighth, and Fourteenth Amendment rights.
11 Plaintiff alleges the "Medical Defendants" (all Defendants
12 except Sheriff Arpaio and Maricopa County) are liable to
13 Plaintiff based on their deliberate indifference to Plaintiff's
14 serious medical needs. Count I alleges Defendant Maricopa County
15 knowingly and intentionally allowed the other Defendants to
16 violate Plaintiff's constitutional rights and that the policies
17 and procedures established by Maricopa County for the medical
18 care of inmates is deficient, inadequate, and violates the
19 United States constitution. In the amended complaint Plaintiff
20 does not allege any action of Sheriff Arpaio which violated
21 Plaintiff's federal constitutional rights. Count I seeks
22 punitive damage against the individual Defendants in addition to
23 compensatory damages, damages for pain and suffering, and

24 _____
25 that are contradicted by documents referred to in
26 the complaint. Warren v. Fox Family Worldwide,
27 Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).
28 Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030-31
(9th Cir. 2008).

1 attorneys' fees and costs.

2 Count II of the amended complaint states a cause of
3 action against the Medical Defendants based on Arizona state
4 tort law for negligence and gross negligence based on the theory
5 of medical malpractice. Plaintiff also alleges Maricopa County
6 is liable for the medical malpractice of those providing medical
7 care to inmates and that Sheriff Arpaio is liable for failure to
8 train jail personnel adequately to prevent medical malpractice
9 in the jails. Pursuant to this claim Plaintiff seeks
10 compensatory and consequential damages.

11 The County Defendants seek to have Plaintiff's claims
12 against them dismissed. Defendants assert Plaintiff failed to
13 exhaust her administrative remedies before filing her federal
14 law claim, precluding relief on Count I. Defendants also
15 contend Plaintiff failed to timely serve a notice of claim
16 pursuant to state law, barring Plaintiff's state-law based
17 claims against the County Defendants.

18 Defendants assert Plaintiff failed to file suit against
19 the County Defendants within the one-year statute of
20 limitations. Defendants further argue Maricopa County cannot be
21 vicariously liability for negligence claims where there is no
22 claim for negligence against the individual medical Defendants.
23 Defendants also contend Plaintiff has failed to state a claim
24 against Sheriff Arpaio for failure to train.

1 Defendants allege:

2 Prior to her incarceration, Plaintiff
3 sustained a significant self-inflicted injury
4 to her ankle... Plaintiff underwent surgery
5 at Scottsdale Osborn Hospital for the
6 placement of pins and a plate to stabilize
7 the ankle.

8 On February 20, 2009, Plaintiff was
9 arrested in connection with the murder of her
10 husband, and was transported to the Maricopa
11 County Sheriff's Office Fourth Avenue Jail
12 Facility where she was processed and booked.
13 After intake, Plaintiff was transferred to
14 the Infirmary at the Lower Buckeye Jail. On
15 March 10, 2009, Plaintiff was seen by
16 Defendant Dr. Gan who noted and documented
17 that Plaintiff had redness and a greenish
18 stain on her leg bandages. Plaintiff was seen
19 again by Dr. Gan on March 26, 2009; at that
20 time, puss (sic) came out of Plaintiff's
21 wound when Dr. Gan pushed on the wound. Dr.
22 Gan recognized that Plaintiff's wound was
23 infected, so he cleaned out the wound and
24 immediately transferred Plaintiff to
25 Scottsdale Osborn Hospital. Plaintiff was
26 released from the hospital back to the Lower
27 Buckeye Jail Infirmary on March 30, 2009.

28 While being treated at the Infirmary,
Plaintiff received her antibiotics as ordered
by the surgeon. Once she completed all of her
antibiotics on May 14, 2009, Plaintiff was
discharged from the Infirmary and transferred
to general population at the Estrella Jail
facility pursuant to the orders of Defendant
Dr. Gregorio.

On May 24, 2009, Plaintiff slipped in her
cell and re-injured her leg. A few days
later, Plaintiff was taken to Maricopa
Medical Center wherein she was diagnosed with
having MRSA - an antibiotic resistant staph
infection. Plaintiff received treatment at
Maricopa Medical Center for the infection.

Plaintiff's lawsuit alleges state law
claims of negligence/medical malpractice and
federal claims based upon 42 U.S.C. § 1983
for deliberate indifference to her medical
needs.

1 **Plaintiff's section 1983 claims**

2 The County Defendants contend Plaintiff's section 1983
3 claims must be dismissed because Plaintiff did not exhaust her
4 administrative remedies.

5 Prisoners are required to exhaust all "available"
6 remedies before seeking relief pursuant to section 1983. See,
7 Woodford v. Ngo, 548 U.S. 81, 85, 126 S. Ct. 2378, 2382-83
8 (2006). The Supreme Court has noted that requiring prisoners to
9 exhaust their administrative remedies allows prison officials
10 "an opportunity to resolve disputes concerning the exercise of
11 their responsibilities before being haled into court," which
12 "has the potential to reduce the number of inmate suits, and
13 also to improve the quality of suits that are filed by producing
14 a useful administrative record." Jones v. Bock, 549 U.S. 199,
15 204, 127 S. Ct. 910, 914-15 (2007), citing Woodford, 548 U.S. at
16 94-95, 126 S. Ct. at 2387-88.

17 Exhaustion of administrative remedies under the Prison
18 Litigation Reform Act ("PLRA") is governed by 42 U.S.C. §
19 1997e(a). This statute provides that "[n]o action shall be
20 brought with respect to prison conditions under section 1983 of
21 this title, or any other Federal law, by a prisoner confined in
22 any jail, prison, or other correctional facility until such
23 administrative remedies as are available are exhausted." 42
24 U.S.C. § 1997e(a) (2003 & Supp. 2011). This language has been
25 interpreted to require "that an inmate must exhaust [available
26 remedies] irrespective of the forms of relief sought and offered
27 through administrative avenues." Booth v. Churner, 532 U.S.

1 731, 741 n.6, 121 S. Ct. 1819, 1825 n.6 (2001). See also Morgan
2 v. Maricopa County, 259 F. Supp. 2d 985, 990 (D. Ariz. 2003).
3 The exhaustion requirement "applies to all inmate suits about
4 prison life, whether they involve general circumstances or
5 particular episodes." Porter v. Nussle, 534 U.S. 516, 532, 122
6 S. Ct. 983, 992 (2002).

7 A plaintiff must fully exhaust their administrative
8 remedies *before* filing a section 1983 complaint. See Vaden v.
9 Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006); McKinney v.
10 Carey, 311 F.3d 1198, 1199-1200 (9th Cir. 2002). To fully
11 exhaust a section 1983 claim, a prisoner must pursue his inmate
12 grievance to the highest administrative level available to them.
13 See, e.g., Thomas v. Woolum, 337 F.3d 720, 726 (6th Cir. 2003);
14 Neese v. Arpaio, 397 F. Supp. 2d 1178, 1180-81 (D. Ariz. 2005).

15 Exhaustion is an affirmative defense; establishing
16 exhaustion of administrative remedies under the PLRA is not a
17 pleading requirement or a jurisdictional prerequisite. See
18 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).
19 Therefore, section 1983 defendants "have the burden of raising
20 and proving the absence of exhaustion." Id., 315 F.3d at 1119.
21 See also Morgan, 259 F. Supp. 2d at 990-91 n.13. The failure to
22 exhaust administrative remedies under the PLRA is treated as a
23 matter in abatement and is properly raised in an unenumerated
24 Rule 12(b) motion. See Wyatt, 315 F.3d at 1119.

25 [A] defendant must demonstrate that pertinent
26 relief remained available, whether at
27 unexhausted levels of the grievance process
or through awaiting the results of the relief
already granted as a result of that process.

1 [. Relevant evidence in so demonstrating
2 would include statutes, regulations, and
3 other official directives that explain the
4 scope of the administrative review process;
5 documentary or testimonial evidence from
6 prison officials who administer the review
7 process; and information provided to the
8 prisoner concerning the operation of the
9 grievance procedure in this case, such as in
10 the response memoranda in these cases. With
11 regard to the latter category of evidence,
12 information provided the prisoner is
13 pertinent because it informs our
14 determination of whether relief was, as a
15 practical matter, "available." [.]

16 Brown v. Valoff, 422 F.3d 926, 937 (9th Cir. 2005).

17 Plaintiff contends that no administrative remedy was
18 available because it was impossible for her to file a timely
19 grievance due to medical disability:

20 In this case, Plaintiff would have had to
21 file her grievance within 48 hours of her
22 discovery of the infection in her leg which
23 occurred on May 29, 2009. When the unknown
24 detention officer had Plaintiff take off the
25 splint, and the open wound and infection was
26 found (Plaintiff fainted as a result and fell
27 to the ground), Plaintiff was immediately
28 provided emergency medical treatment which
29 resulted in her being whisked to Scottsdale
30 Osborn Hospital where she received at least
31 three surgeries from May 19, 2009 to June 13,
32 2009.

33 Throughout this time, until the wound was
34 finally closed, she lay in her hospital bed
35 with IV's pumping pain killers and
36 antibiotics into her body with open draining
37 wound on her leg. Based on the MCSO grievance
38 policy, Plaintiff was required to file the
39 grievance for those causing her medical
40 condition (based on the discovery rule),
41 within 48 hours of May 29, 2009; i.e., by May
42 31, 2009. After that it is was late and there
43 is no policy that allows late grievances.
44 After the discovery of her infection, she
45 received proper and timely medical care and
46 treatment. There was nothing further to
47 grieve and all that could be done for her
48 medical condition was being done. There were

1 no corrective actions, after the discovery of
2 the infection that could have taken place.

3 Under these set of facts, there was no
4 "available administrative remedy" to
5 Plaintiff. Even though MCSO has an
6 administrative grievance policy, because of
7 Plaintiff's disability and emergency
8 hospitalization, she had no timely access to
9 that administrative process. Under this set
10 of facts, there was in reality no grievance
11 policy at all that she could take advantage
12 of. By June 13, 2009, when she returned from
13 the hospital, it was too late to file a
14 grievance pursuant to the policy.

15 Doc. 30 at 5 (emphasis in original).

16 Defendants reply:

17 As established by the affidavit of MCSO Sgt.
18 Selethia Down, attached as Exhibit 1, an
19 inmate who is out of the jail facility and in
20 the hospital during the grievance time frame
21 may submit or continue a grievance upon
22 his/her return to the jail. This procedure is
23 similar to the one successfully relied upon
24 by the plaintiff in the Morano case. Here,
25 Ms. DeVault did absolutely nothing to pursue
26 a grievance about her medical care or the
27 other issues that form the basis of her
28 federal law claims. DeVault abandoned the
matter completely when she returned to the
jail following her hospitalization....

Doc. 32 at 4-5.

The federal courts have held that, when prison
officials have refused an inmate grievance forms or otherwise
obstructed an inmate's access to a grievance proceeding, this
could raise an inference that the prisoner had exhausted his
"available" administrative remedies because no remedy was
"available" in such a circumstance. See Miller v. Norris, 247
F.3d 736, 738, 740 (8th Cir. 2001). However, the federal courts
have also concluded that an assertion that pursuing

1 administrative remedies would be futile does not excuse an
2 individual's failure to exhaust his administrative remedies
3 prior to filing a section 1983 action on the basis that in that
4 circumstance no remedy was "available." See, e.g., Nyhuis v.
5 Reno, 204 F.3d 65, 71-75 (3d Cir. 2000); Perez v. Wisconsin
6 Dep't of Corr., 182 F.3d 532, 536-37 (7th Cir. 1999); Neese, 397
7 F. Supp. 2d at 1182-83.

8 Plaintiff does not assert that, at any time subsequent
9 to the events giving rise to her claims and prior to the date
10 she filed the complaint, she inquired into the necessity or
11 potential for administratively grieving her complaint that she
12 was not provided with adequate medical care. Plaintiff does not
13 allege that she was told that any such grievance was not
14 available or that any such grievance would be denied per se as
15 not timely. Additionally, Exhibit 8 to the motion to dismiss
16 indicates that Plaintiff initiated grievances on May 23, 24, 25,
17 June 19 and July 15.

18 Plaintiff argues that, as a matter of law, any attempt
19 to grieve her claim would have been declared untimely and,
20 accordingly, an administrative grievance procedure was therefore
21 "unavailable" and her failure to exhaust should be excused.
22 This type of post-hoc explanation for a plaintiff's failure to
23 exhaust an available administrative remedy, thereby somehow
24 rendering it unavailable, has been found by the federal courts
25 to be unavailing. See Chelette v. Harris, 229 F.3d 684, 688
26 (8th Cir. 2000) (concluding that section 1997e(a) does not
27 permit the court to consider an inmate's subjective beliefs in

1 determining whether administrative procedures are "available.");
2 Perez, 182 F.3d at 537³; Brown, 422 F.3d at 936-37; Jones, 266
3 F.3d at 399.

4 Accordingly, the Magistrate Judge recommends that the
5 motion to dismiss be granted with regard to Plaintiff's section
6 1983 claims against all Defendants named in this count of the
7 complaint.

8 The Magistrate Judge further recommends that, no
9 federal cause of action remaining, the Court decline to exercise
10 supplementary jurisdiction over the remaining state claims. See
11 McKinney v. Carey, 311 F.3d 1198, 1200-01 n.2 (9th Cir. 2002).

12 Accordingly,

13 **IT IS RECOMMENDED that** Plaintiff's motion to strike
14 (Doc. 31) be denied with regard to Exhibit 2 and Exhibit 8 to
15 the motion to dismiss and that the motion to strike be denied as
16 moot with regard to the other documents Plaintiff seeks to
17 strike.

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21 Such an ex post view of "futility" would
22 contradict the holdings of Hallstrom and McNeil,
23 for in both of those cases it became clear while
24 the suit was ongoing that nonjudicial relief
25 would not be forthcoming. As for the possibility
26 that administrative remedies could be declared
27 futile ex ante, without ever being tried: what
28 would be the point of asking judges to be seers?
Then the simplicity of § 1997e(a) would be lost,
and instead of requiring exhaustion of
administrative remedies it would lead to
guesswork about counterfactual situations. No one
can know whether administrative requests will be
futile; the only way to find out is to try.

1 **IT IS FURTHER RECOMMENDED that** Defendants' motion to
2 dismiss (Doc. 28) be granted with regard to Plaintiff's section
3 1983 claim and that Plaintiff's state-law based claim be
4 remanded to the Superior Court.

5 This recommendation is not an order that is immediately
6 appealable to the Ninth Circuit Court of Appeals. Any notice of
7 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
8 Procedure, should not be filed until entry of the district
9 court's judgment.

10 Pursuant to Rule 72(b), Federal Rules of Civil
11 Procedure, the parties shall have fourteen (14) days from the
12 date of service of a copy of this recommendation within which to
13 file specific written objections with the Court. Thereafter,
14 the parties have fourteen (14) days within which to file a
15 response to the objections. Pursuant to Rule 7.2, Local Rules
16 of Civil Procedure for the United States District Court for the
17 District of Arizona, objections to the Report and Recommendation
18 may not exceed seventeen (17) pages in length.

19 Failure to timely file objections to any factual or
20 legal determinations of the Magistrate Judge will be considered
21 a waiver of a party's right to de novo appellate consideration
22 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
23 1121 (9th Cir. 2003) (en banc). Failure to timely file
24 objections to any factual or legal determinations of the
25 Magistrate Judge will constitute a waiver of a party's right to
26 appellate review of the findings of fact and conclusions of law
27 in an order or judgment entered pursuant to the recommendation

1 of the Magistrate Judge.

2 /

3 DATED this 31st day of January, 2012.

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Mark E. Asper
United States Magistrate Judge